

## THIRD DIVISION

**[ G.R. No. 179800, February 04, 2010 ]**

**REPUBLIC OF THE PHILIPPINES REPRESENTED BY THE  
COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS.  
PHILIPPINE AIRLINES, INC. (PAL), RESPONDENT.**

### DECISION

**PERALTA, J.:**

Before this Court is a Petition for Review on *Certiorari*,<sup>[1]</sup> under Rule 45 of the Revised Rules of Court, seeking to set aside the August 9, 2007 Decision<sup>[2]</sup> and September 17, 2007 Resolution<sup>[3]</sup> of the Court of Tax Appeals (CTA) *En Banc*, in E.B. Case No. 273 (CTA Case No. 6962).

The facts, as culled from the record by the CTA *En Banc*:

[Respondent Philippine Airlines] (PAL) is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines. It is engaged in the air transportation business with principal address at the 9<sup>th</sup> Floor, PAL Center, Legaspi Village, Makati City.

[Petitioner] Commissioner of Internal Revenue [CIR] is the duly authorized government official empowered, among others, to refund erroneously collected taxes under the 1997 National Internal Revenue Code (NIRC), as amended, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

To meet the exigencies of its daily business operations, [respondent] PAL availed [of] the communication services of the Philippine Long Distance Company (PLDT). For the period January 1, 2002 to December 31, 2002, PAL allegedly paid PLDT the 10% [Overseas Communications Tax] OCT in the amount of P134,431.95 on its overseas telephone calls.

On February 24, 2004, [respondent] PAL, through its AVP-Financial Planning and Analysis Ma. Stella L. Diaz, filed with the Commissioner a claim for refund in the amount of P134,431.95 representing the total amount of 10% OCT paid to PLDT from January to December 2002 citing as legal bases Section 13 of Presidential Decree (P.D.) No. 1590<sup>[4]</sup> and BIR Ruling No. 97-94 dated April 13, 1994.

Due to the Commissioner's inaction on its claim for refund, PAL appealed before the CTA on April 22, 2004. The case was raffled to the Second Division of the CTA.<sup>[5]</sup>

Respondent PAL argued that since it incurred negative taxable income<sup>[6]</sup> for fiscal years 2002 and 2003 and opted for zero basic corporate income tax, which was lower than the 2% franchise tax, respondent PAL had complied with the "in lieu of all other taxes" clause of Presidential Decree (P.D.) No. 1590.<sup>[7]</sup> Thus, it was no longer liable for all other taxes of any kind, nature, or description, including the 10% OCT, and the erroneous payments thereof entitled it to a refund pursuant to its franchise.<sup>[8]</sup>

Petitioner CIR disagreed. It maintained that Section 120 of the 1997 NIRC, as amended, imposes 10% OCT on overseas dispatch, message or conversion originating from the Philippines, which includes PLDT communication services. It further stated that respondent PAL, in order for it to be not liable for other taxes, in this case the 10% OCT, should pay the 2% franchise tax, since it did not pay any amount as its basic corporate income tax.<sup>[9]</sup>

### **Ruling of CTA Second Division**

The CTA Second Division rendered a Decision dated November 13, 2006, and ruled that respondent PAL was not required to pay the 10% OCT and, therefore, was not entitled to the refund, based on the "in lieu of all taxes" provision under Sec. 13 of P.D. No. 1590, respondent PAL's franchise.

The Second Division granted respondent PAL's claim for a refund of the OCT, albeit in the reduced amount of P93,424.67.<sup>[10]</sup> The amounts of P2,424.16 and P38,583.12 were disallowed due to non-verification and prescription, respectively.<sup>[11]</sup>

The Second Division reasoned that since respondent PAL chose to pay the basic corporate income tax for January to December 2002, and given that for the same period respondent PAL incurred zero tax liability, it was not required to pay the 2% franchise tax before it could avail itself of the "in lieu of all taxes" provision under Sec. 13 of P.D. No. 1590.<sup>[12]</sup> It emphasized that the law simply states that PAL, in order for it to be exempt from taxes, must only choose between two alternatives under Sec. 13 of P.D. No. 1590, namely: (1) the basic corporate income tax or (2) the 2% franchise tax.<sup>[13]</sup> And, having chosen the first option, respondent PAL was under no obligation to pay the 2% franchise tax in order to avail itself of the exemption.

Petitioner CIR filed a Motion for Partial Reconsideration of the Decision of the CTA Second Division. However, the same was denied on February 7, 2007. Consequently, petitioner CIR filed a Petition for Review with the CTA *En Banc*.

### **Ruling of the CTA *En Banc***

The CTA *En Banc* upheld the Decision of the CTA Second Division and pointed out that since respondent PAL chose the first option, even if it incurred negative taxable income and consequently did not pay any income tax, it could still avail itself of the exemption, and could not be held liable for the 10% OCT.<sup>[14]</sup> The **operative act**, in order for it to avail itself of exemption from all other taxes under the "in lieu of all

other taxes" clause of its Charter, **is actual exercise by respondent PAL of the option to avail itself either of the basic corporate income tax or the 2% franchise tax**, and no actual payment is required.<sup>[15]</sup>

Hence, the Commissioner of Internal Revenue, through the Office of the Solicitor General, filed before this Court a Petition for Review on *certiorari* under Rule 45 of the Rules of Court assailing the CTA *En Banc* Decision dated August 9, 2007.

### **Issue**

The sole issue for consideration before this Court, as stated in the present petition, is:

**WHETHER OR NOT RESPONDENT IS EXEMPT FROM THE PAYMENT OF THE 10% OVERSEAS COMMUNICATIONS TAX UNDER ITS FRANCHISE, PD 1590, AND THEREFORE, ENTITLED TO THE REFUND PRAYED FOR.**<sup>[16]</sup>

### **The Court's Ruling**

The petition is without merit.

Sec. 13 of P.D. No. 1590 states that:

In consideration of the franchise and rights hereby granted, the grantee shall pay to the Philippine Government during the life of this franchise whichever of subsections (a) and (b) hereunder will result in a lower tax:

(a) The basic corporate income tax based on the grantee's annual net taxable income computed in accordance with the provisions of the National Internal Revenue Code; or

(b) A franchise tax of two percent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or nontransport operations; provided, that with respect to international air-transport service, only the gross passenger, mail, and freight revenues from its outgoing flights shall be subject to this tax.

The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes, duties, royalties, registration, license, and other fees and charges of any kind, nature, or description, imposed, levied, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future, including but not limited to the following:

x x x x

Petitioner firmly contends that the law uses the mandatory terms "shall pay...